

FILED  
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

NOV 18 2004  
DIST. CLERK UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK

**KAREN HAGEN,**

**Plaintiff,**

**vs.**

**RAYMOND M. SCHMIDT, d.b.a.  
SCHMIDT TRUCKING, and PATRICK  
McCONE,**

**Defendant.**

**MEMORANDUM DECISION AND  
ORDER**

Case No. 2:03CV411DAK

This matter is before the court on Defendants' Motion for Partial Summary Judgment and To Exclude Evidence, Defendants' Motion in Limine to Exclude Expert Economic Testimony, and Defendants' Motion in Limine Concerning Plaintiff's Health Care Expenses. The court held oral arguments on the motions on November 16, 2004. Plaintiff was represented by Peter Collins and Defendants were represented by Clifford Ross. The court took the motions under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to Defendant's motion. Now being fully advised, the court enters the following Memorandum Decision and Order.

**BACKGROUND**

The parties stipulate to liability in this case. Therefore, the only issue in the case is damages. The case arises out of an accident on U.S. Highway 6 in which one of Defendant's

50

semi-trucks lost control, crossed the center line, tipped over and collided with Plaintiff's vehicle. Plaintiff received substantial injuries and was life-flighted to L.D.S. Hospital in Salt Lake City. Plaintiff sustained fractured ribs, elbow, scapula, lacerations to her chest, head injuries, and severed the medial nerve in her hand. Plaintiff has had operations, extensive medical treatment, and physical therapy to restore function to her arm. However, the use of her hand is significantly diminished.

Hagen worked as a registered nurse in occupational health at a hospital in Grand Junction, Colorado. When the accident occurred, she was traveling to Salt Lake City for work-related training. After being hospitalized for twelve days and being off work during the aftermath of the accident, Hagen returned to work part-time for a period of time. Because of her disability and diminished grip-strength, Hagen was not able to continue in her position as a nurse in the occupational health department. The hospital moved Hagen into a position in the surgery department doing pre-operation counseling for surgical patients at the hospital.

In her new position, Hagen is scheduled to work full-time and receives the same hourly rate. However, she testified and has provided time sheets to demonstrate that she averages only around 30 hours per week because of the lack of need for her work in the new position. In her previous position, she often worked over-time hours. The hospital's vice president over human resources testified that Hagen's new position will continue for the foreseeable future.

Hagen's Vocational Rehabilitation Expert, Terri L. Marshall, has prepared a report addressing Hagen's employability as a result of the injuries she sustained in the accident. Marshall states that Hagen's future earning capacity is diminished as a result of her limited range of positions in the nursing field and, based on Department of Commerce statistics, her work life

expectancy is shortened by 4.4 years because of her disability. Plaintiff's economist, Paul Randle, has calculated the present value of Hagen's damages.

## DISCUSSION

### Motion for Partial Summary Judgment &

### Motion in Limine to Exclude Expert Economic Testimony

Defendants' motion for summary judgment seeks a ruling precluding punitive damages. However, Plaintiff stipulated in her opposition memorandum *that she was not seeking punitive damages*. Therefore, the punitive damages issue is moot. The issue raised by both Defendants' Motion for Partial Summary Judgment and Motion in Limine to Exclude Expert Economic Testimony is whether the testimony of Plaintiff's experts regarding future economic damages is admissible before the jury. Defendants argue that future loss of earnings and loss of earning capacity are not recoverable as a matter of law in this case.

Under Rule 702 of the Federal Rules of Evidence,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable *principles and methods*, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Defendants contend that Plaintiff's claim for loss of future income and diminished earning capacity is speculative because rather than focusing on the fact that Plaintiff is currently employed and will be for the foreseeable future, *Plaintiff's experts focus on hypotheses* regarding her ability to get a new job and statistical trends relating to injured or disabled people

in general rather than this particular plaintiff. Therefore, Defendants assert that this court should exclude the expert testimony on future loss of income and earning capacity because it is not helpful to a jury and involves an unsound method.

With respect to future earnings, Hagen's loss of income is not speculative. Although her hourly rate has remained the same, her average work hours have been reduced to around thirty hours per week. Her time sheets provide the requisite basis for this assertion. Therefore, it is not speculative. Furthermore, Hagen can demonstrate that she previously worked substantial overtime and that this position does not offer such opportunities. Again, her time sheets can document this allegation. Therefore, Hagen's clearly has a claim for future lost wages.

Future earning capacity is separate from future wages. In *Clawson v. Walgreen Drug Co.*, 162 P.2d 759 (Utah 1945), the court explained that the "impairment of earning capacity involves the capacity of the injured person rather than merely what he might have made following his ordinary pursuit, it is not error to permit the jury to consider impairment of earning capacity as an element of damage. . . . The focal point of the inquiry is not what the plaintiff actually would have earned, but the difference in his capacity to earn – before and after the injury." *Id.* at 765. The Utah Court of Appeals has also stated that "in order to recover for lost earning capacity, the loss must be proven with 'reasonable certainty,' although not 'mathematical certainty.'" *Corbett v. Seamons*, 904 P.2d 229, 274 (Utah App. 1995).

Regardless of the fact that Hagen is currently employed, a jury should be allowed to consider the testimony of Hagen's experts with respect to future earning capacity. Testimony to the fact that Hagen has suffered a loss of employment opportunities within the hospital, the nursing field, and in the work force in general as a result of the injuries she sustained in the

accident at issue is not so speculative that this court should exclude it as a matter of law. One statement by a supervisor that Hagen's position will remain in place for the foreseeable future does not make any other discussion of her long-term employment opportunities speculative. There is no indication as to how that supervisor defines the "foreseeable future" -- it could be the next two years, the next five years, or the next twenty years. Hagen is only 44 years old and has a considerable work life in front of her. Nothing in the opinions of Hagen's experts appear so outside the realm of reasonableness that this court must exclude their opinions.

In addition, testimony about a general shortened work-life expectancy is admissible even though it is based on a general governmental table. The table is applicable to individuals with disabilities similar to Plaintiff's disability. *In that regard, the expert's opinion that the table applies to the plaintiff in this case is a sufficient nexus and sufficiently tailored to this case.* Juries are often faced with quantifying difficult conceptual damages. However, that does not make the damages unavailable or the testimony supporting such damages speculative.

Both sides are making predictions in this case as to Hagen's future damages. Defendants will have ample opportunity to give their own arguments with respect to appropriate damages. Defendants will also have the ability to cross examine Plaintiff's experts and highlight how in fact they believe the testimony is speculative or inapplicable to the case. The jury can then weigh the evidence. This is not an instance where the court needs to preclude expert testimony because of its gatekeeping role. This court finds no grounds for preclude evidence of Plaintiff's future earning capacity as a matter of law. Accordingly, Defendants' motion for partial summary judgment is denied. Similarly, Defendants' Motion in Limine to Exclude Expert Economic Testimony, which is based on the same arguments, is denied.

**Motion in Limine Concerning Plaintiff's Health Care Expenses**

Defendants also move to exclude all evidence of or reference to Plaintiff's claimed past or future health care expenses and to strike her claims for such amounts as a discovery sanction because they claim that Plaintiff's responses to written discovery and Rule 26 disclosures were inadequate.

Plaintiff's March 30, 2004 designations of fact and expert witnesses relating to health care costs states that she will call records custodians and business office personnel working in association with the health care providers who have provided services in connection with Plaintiff's injuries from the accident in the event that Defendants do not stipulate to foundation, reasonableness of charges, etc. In response to written discovery requests, Plaintiff's September 14, 2004 answers list various providers of health care services who will testify that their charges are reasonable and that such services were necessary if Defendants do not stipulate to such propositions. One interrogatory asked Plaintiff to detail all economic injuries, losses or damages by category, amount, all facts relied upon, and all documents upon which she relied. Plaintiff responded that the amount of past medical expenses claimed was \$154,410.22, and referred to a *summary of charges prepared by Plaintiff's counsel*. Plaintiff described future expenses as "unknown at this time." Also in response to requests for production, Plaintiff provided a summary of medical expenses without attaching the underlying medical invoices.

The parties main dispute at oral argument focused on whether Plaintiff has provided all of the underlying medical records and bills to Defendants. This court obviously has no way of knowing which side is accurate in this regard. However, the court finds it unusual that if Defendants had the names of Plaintiff's medical providers that they did not do their own

subpoenas for the records.

In any event, the court has reviewed the discovery documentation provided by each of the parties. The court does not find any discovery abuse warranting sanctions of any kind. The problem appears to be more of a communication problem between counsel than a situation in which one party is attempting to evade its discovery responsibilities. In addition, even if all of the documents have not been provided to date, there is still sufficient time before trial for Defendants to prepare adequately if all of the documents are provided shortly. Accordingly, the court finds no basis for excluding health care expenses or striking Plaintiff's claims for health care expenses. Therefore, Defendant's motion in limine is denied.

Nonetheless, the court does conclude that Defendants are entitled to a copy of all of the invoices and records relied upon by Plaintiff to make her summary. The collateral source rule may make workers' compensation payments inadmissible at trial but they are discoverable at this stage of the proceedings. Therefore, the court orders that counsel for the parties meet and confer as to what documents Defendants need within ten days of the date of this order. Plaintiff shall then provide the necessary documents within fifteen days. The court expects that the parties should be able to stipulate to a significant portion of the health care expenses in this case.

### **Trial Depositions**

At the hearing on these motions, Plaintiff's counsel requested that he be allowed to take trial depositions of individuals beyond the subpoena power of this court. Defendant's objected because the fact discovery deadline has passed. Because several of the health care providers are residents of Colorado, this court agreed that such depositions could be conducted. Either party may conduct trial depositions of parties outside this court's subpoena power up to twenty days

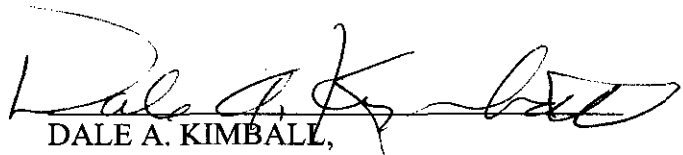
before the trial date.

### CONCLUSION

For the reasons stated above, Defendant's Motion for Partial Summary Judgment and To Exclude Evidence is DENIED, Defendants' Motion in Limine to Exclude Expert Economic Testimony is DENIED, and Defendants' Motion in Limine Concerning Plaintiff's Health Care Expenses is DENIED. In addition, both parties are allowed to conduct necessary trial depositions of individuals beyond the subpoena power of the court up to twenty days before trial.

DATED this 18<sup>th</sup> day of November, 2004.

BY THE COURT:



DALE A. KIMBALL,  
United States District Judge



blk

United States District Court  
for the  
District of Utah  
November 19, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cv-00411

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Peter C. Collins, Esq.  
PETER C COLLINS LLC  
623 E 2100 S  
SALT LAKE CITY, UT 84106  
JFAX 9,4671800

Mr. Clifford C Ross, Esq.  
DUNN & DUNN  
505 E 200 S 2ND FL  
SALT LAKE CITY, UT 84102  
JFAX 9,5219998